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7 ANTONIO GARRETT,  
8 Plaintiff,  
9 v.  
10 TP-LINK RESEARCH AMERICA  
11 CORPORATION,  
12 Defendant.  
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Case No. [20-cv-03491-SI](#)

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28 **ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS THE FIRST  
AMENDED COMPLAINT**

Re: Dkt. No. 35

Now before the Court is defendant's motion to dismiss the first amended complaint. Dkt. No. 35. This matter came on for videoconference hearing on November 13, 2020. For the reasons set forth below, the Court **DENIES** the motion to dismiss.

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18 **BACKGROUND**

19 On May 22, 2020, plaintiff Antonio Garrett ("Garrett") filed this patent infringement  
20 action against defendant TP-Link Research America Corporation ("TPRA") and its "line of Kasa®  
21 security cameras." Dkt. No. 1 (Complaint). On September 14, 2020, this Court granted TPRA's  
22 motion to dismiss Garrett's original complaint, with leave to amend. Dkt. No. 32 (Order on First  
23 Motion to Dismiss). On September 25, 2020, Garrett filed his First Amended Complaint ("FAC").  
24 Dkt. No. 34. The FAC contains several new allegations. Most notably, the new allegations map  
25 the accused products to the claim limitations. *See id.* ¶¶ 35-40, 42-45. The FAC also alleges that  
26 "[t]he Kasa® surveillance system products cannot be used, tested, or demonstrated without a  
27 mobile device on which to install the Kasa® mobile application." *Id.* ¶ 18. Moreover, the FAC  
28 includes two claims charts for the patents-at-issue. *See* Dkt. Nos. 34-4, 34-5.

1       The FAC alleges direct and indirect infringement of two patents held by Garrett: U.S.  
2 Patent Nos. 9,854,207 (“the ’207 patent”) and 10,511,809 (“the ’809 patent”). Specifically,  
3 Garrett alleges TPRA directly infringes the system claims of the ’207 patent, *see id.* ¶¶ 33, 51, and  
4 that TPRA indirectly infringes the system and method claims of both the ’207 patent and the ’809  
5 patent, *id.* ¶¶ 20-21.<sup>1</sup> The patents-at-issue generally relate to systems and methods for mobile  
6 surveillance. *See id.* ¶ 8. These inventions include “a camera for monitoring a surveillance area  
7 and a mobile device for receiving surveillance information from the camera.” *Id.*

8       On December 26, 2017, the ’207 patent was duly and legally issued by the U.S. Patent and  
9 Trademark Office. *Id.* ¶ 10. The ’207 patent contains four independent claims, which include  
10 both system and method claims. Dkt. No. 34-1 (the ’207 patent). Claims 1, 10, and 18 require a  
11 “server,” a “mobile device,” and a “camera.” *Id.* Claim 19, a system claim, requires only a  
12 “mobile device” and a “camera.” *Id.* Independent claim 19 is alleged as representative of the  
13 claims recited in the ’207 patent. FAC ¶ 13. This claim states:

14       A mobile surveillance system, comprising:

15       a mobile device configured to communicate with at least one camera positioned at a  
16 surveillance area, wherein the at least one camera captures surveillance data of the  
17 surveillance area; and

18       the mobile device is configured to control activation of the mobile surveillance  
19 system, and control start and stop of the capture of the surveillance data, and  
20 transfer of the surveillance data, wherein, the surveillance data is wirelessly  
21 communicated directly from a transmitter linked to the camera to the mobile  
22 device; and

23       the mobile device is further configured to activate upon detection of motion at the  
24 surveillance area,

25       wherein the detection of motion detects variations in motion measurements at the  
26 surveillance area; and

27       wherein the mobile device activates when the motion measurements exceeds a  
28 determined threshold.

Dkt. No. 34-1 at 13 (the ’207 patent).<sup>2</sup>

On December 17, 2019, the ’809 patent was duly and legally issued by the U.S. Patent and

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<sup>1</sup> Garrett has dropped his claims for direct infringement of the ’809 patent and for willful infringement.

<sup>2</sup> All page numbers listed hereafter refer to the ECF branded numbers.

1 Trademark Office. FAC ¶ 11. The '809 patent contains three independent claims, all of which are  
2 method claims. Dkt. No. 34-2 (the '809 patent). Claim 1 requires a "server," a "mobile device,"  
3 and a "camera." *Id.* Claims 10 and 18 require only a "mobile device" and a "camera." *Id.*  
4 Independent claim 10 is alleged as representative of the claims recited in the '809 patent. FAC  
5 ¶ 14. This claim states:

6 A method for conducting surveillance, comprising:  
7 receiving an instruction from a mobile device to control start and stop of capture of  
surveillance data at a surveillance area;  
8 capturing the surveillance data by a camera at the surveillance area, wherein the  
camera is operably engaged to a motion detection mechanism for detecting  
9 variations in motion measurements at the surveillance area; and  
10 transferring said surveillance data to the mobile device when the motion detection  
mechanism obtains a motion detection measurement that exceeds a predetermined  
threshold indicating the surveillance area is unsecure,  
11 wherein the mobile device displays a datebook comprising days of the week and  
12 times of day that can be synchronized with an application of the user device to  
13 schedule the transferring of surveillance data.

14 Dkt. No. 34-2 at 13 (the '809 patent).

15 On October 9, 2020, TPRA filed the instant Motion to Dismiss, arguing that the FAC  
16 should be dismissed in its entirety because it fails to recite a plausible claim of patent  
17 infringement. Dkt. No. 35. In his Opposition filed October 23, 2020, Garrett argued that he  
18 sufficiently amended his complaint to plead infringement by TPRA. Dkt. No. 37. TPRA filed a  
19 Reply on October 30, 2020. Dkt. No. 38.

## 21 **LEGAL STANDARD**

22 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint  
23 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to  
24 dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its  
25 face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard  
26 requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant  
27 has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require  
28 "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to

1 relief above the speculative level.” *Twombly*, 550 U.S. at 555. “A pleading that offers ‘labels and  
2 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*,  
3 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders  
4 ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at  
5 557). “While legal conclusions can provide the framework of a complaint, they must be supported  
6 by factual allegations.” *Id.*

7 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in  
8 the complaint and draw all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los*  
9 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, a district court is not required to accept as  
10 true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
11 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

## 12 13 DISCUSSION

### 14 I. Direct Infringement by TPRA

15 Garrett alleges that TPRA directly infringes the system claims of the ’207 patent, arguing  
16 that TPRA “makes and uses the patented system by combining each and every element of system  
17 claims recited in the asserted patents[.]” FAC ¶ 32. In its motion to dismiss, TPRA contends that  
18 Garrett has failed to allege a plausible claim that TPRA “makes” or “uses” the accused products in  
19 an infringing manner, arguing that (a) Garrett relies on evidence previously found to be  
20 insufficient by this Court, (b) the newly added allegations are conclusory and contradict prior  
21 allegations, and (c) the remaining allegations are based on “use” of the accused products in  
22 advertisements, which are “mere demonstrations” that cannot amount to infringement. Dkt. No.  
23 35 at 9-12. Additionally, in its reply brief, TPRA argues that Garrett’s “make” claims are  
24 dependent on his “use” claims, so the “make” claims should also be dismissed. Dkt. No. 38 at 7.

#### 25 26 A. Garrett May Rely on the Evidence in Exhibit C.

27 As to TPRA’s argument that the FAC should be dismissed because the FAC relies  
28 “primarily on evidence that this Court previously found to be insufficient,” such as 120 pages of

1 users guides and the promotional videos on TPRA’s website, *see* Dkt. No. 35 at 10, the Court  
2 disagrees.

3 Most of the substantive allegations of the original complaint were contained in six  
4 paragraphs. *See* Dkt. No. 1 ¶¶ 17-21, 27. Garrett relied almost entirely on Exhibit C, which was  
5 120 pages of TPRA instruction manuals and user guides, to allege infringement. *Id.* While it was  
6 possible that TPRA or an end user *could have* infringed, this Court found that the complaint failed  
7 to affirmatively allege that anybody actually infringed. Dkt. No. 32 at 7. Garrett has now added  
8 additional allegations to the FAC which map the exhibits to the claims and focus those claims to  
9 specific conduct by TPRA and its end users. *See, e.g.*, FAC ¶¶ 35-40 (mapping an illustrative  
10 example of a use of the accused products to the patented claims). Additionally, the FAC now  
11 includes two claim charts—one for each of the patents-at-issue. *See generally*, Dkt. Nos. 34-4, 34-  
12 5. This is meaningfully different from the rather bare allegations of the original complaint.

13 Moreover, the Court did not previously find Exhibit C to be *per se* deficient. As this Court  
14 stated in its first order dismissing the complaint:

15 Some patents and patent claims may require the patentee to provide more detail  
16 than others. The Court can imagine that as to some types of straightforward  
17 apparatus claims, for example, simply setting out what the patent claims require  
18 and then reproducing a picture of an accused product (perhaps with a little  
explanation of what is depicted) might be all that is needed. As to other apparatus  
claims, such as those implicating more complicated technology like that at issue  
here, more is likely going to be necessary.

19 Dkt. No. 32 at 6 (quoting *North Star Innovations, Incorporated v. Micron Technology,*  
20 *Incorporated*, No. CV 17-506-LPS-CJB, 2017 WL 5501489, at \*3 (D. Del. Nov. 16, 2017), *report*  
21 *and recommendation adopted*, No. CV 17-506-LPS-CJB, 2018 WL 11182741 (D. Del. Jan. 3,  
22 2018)). The Court therefore disagrees with TPRA’s premise that Garrett may not rely on Exhibit  
23 C to support the allegations in the FAC.

24

25 **B. The New Allegations Are Not Conclusory, and Any Contradictory Allegations  
26 Are Not Fatal.**

27 TPRA also argues that the FAC “only adds legal conclusions couched as factual  
28 allegations that should be given no weight” or allegations that are “rank speculation and plainly

1 incorrect.” Dkt. No. 35 at 11-12.

2 The Court disagrees that the FAC only adds conclusory allegations. As described earlier,  
3 the FAC adds several allegations which map specific uses of the accused products to the claim  
4 limitations. *See* FAC ¶¶ 35-40, 42-45. Additionally, Garrett now alleges that “[t]he Kasa®  
5 surveillance system products cannot be used, tested, or demonstrated without a mobile device on  
6 which to install the Kasa® mobile application.” *Id.* ¶ 18. This is supported by statements on  
7 TPRA’s website, which Garrett cites in the FAC, *see id.* (“All Kasa Cams require and only work  
8 with the Kasa for Mobile App.”), as well as by the user manuals attached in Exhibit C, *see, e.g.*,  
9 Dkt. No. 34-3 at 14 (instructing users how to set up the surveillance system using the mobile  
10 application). These allegations are not conclusory.

11 TPRA also takes issue with the new allegation from the FAC that states, “. . . TP-Link also  
12 made and/or used each and every element of the patented system during each Kasa® product’s  
13 development and/or testing, and TP-Link continues to make and use the entire patented system  
14 each time it tests or demonstrates its Kasa® products or a feature thereof.” Dkt. No. 35 at 12  
15 (quoting FAC ¶ 46). In its motion, TPRA argues that “Garrett focuses on combining the  
16 application with a mobile device during testing, but he ignores the combination’s non-infringing  
17 uses.” *Id.* In its reply brief, TPRA somewhat re-frames this argument, taking the position that this  
18 allegation contradicts the evidence Garrett relies on, namely the video referenced in the FAC, *see*  
19 FAC ¶¶ 43-35. TPRA states this video was “a staged commercial,” showing a blank screen, that  
20 contradicts the allegation that TPRA “make[s] and use[s] the entire patented system each time it  
21 tests or demonstrates its Kasa® products or a feature thereof.” Dkt. No. 38 at 8; FAC ¶ 46.

22 Even if TPRA is correct that some of Garrett’s allegations contradict other allegations or  
23 the exhibits, such contradictions are not fatal at this stage of the case. The cases on which TPRA  
24 relies do not mandate dismissal of the action but rather stand for the proposition that inconsistent  
25 allegations in a complaint may be disregarded or read in light of the other allegations (even if from  
26 previous complaints in the same matter). *See* Dkt. No. 38 at 12 (citing *J. Edwards Jewelry  
Distrib., LLC. v. Wells Fargo & Co.*, No. 18-CV-03886, 2019 WL 2329248, at \*4 (N.D. Cal. May  
27 31, 2019); *Schneidereit v. Tr. of the Scott & Brian, Inc.*, No. 11-CV-06919, 2012 WL 12884908,  
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1 at \*1 n.5 (C.D. Cal. Apr. 27, 2012); *Stanislaus Food Prod. Co. v. USS-POSCO Indus.*, 782 F.  
2 Supp. 2d 1059, 1076–77 (E.D. Cal. 2011)). For instance, in *Schneidereit*, the district court found  
3 that “the Court may consider Plaintiffs’ prior allegations in determining the *plausibility* of their  
4 allegations in the TAC.” 2012 WL 12884908, at \*1 n.5 (emphasis in original). “In light of  
5 Plaintiffs repeatedly admitting in prior pleadings that they defaulted,” the district court found that  
6 “their new, unsupported, and contradictory allegation” that Plaintiffs did not default was  
7 implausible. *Id.* And in *J. Edwards Jewelry*, the district court simply found that eliminating  
8 allegations and exhibits in an amended complaint did not change the court’s analysis because the  
9 court could still “consider the prior allegations [from earlier complaints] as part of its ‘context-  
10 specific’ inquiry.” 2019 WL 2329248, at \*4 (quoting *Cole v. Sunnyvale*, No. C-09-05017 RMW,  
11 2010 WL 532428, at \*4 (N.D. Cal. Feb. 9, 2010)).

12 At this stage, and based on the pleadings and exhibits on file, the Court will not find that  
13 any contradictory allegations warrant dismissal. In light of the other allegations, it is reasonable to  
14 read the allegation in question, ¶ 46, as alleging that TPRA infringes during its product  
15 development and testing of the accused products or certain features thereof, at least insofar as  
16 TPRA “makes” or “uses” the accused products or certain features thereof in the manner described  
17 in the other allegations. Under a reasonable reading of the FAC, Garrett is alleging that TPRA  
18 makes and uses the entire patented system when it tests or demonstrates its Kasa® products or a  
19 feature thereof. The Court will not dismiss the FAC based on contradictory allegations.

20

21 **C. Garrett Alleges a Plausible Claim of Infringing “Use.”**

22 TPRA argues that “the mere demonstration or display of an accused product, even in an  
23 obviously commercial atmosphere[,] is not an act of infringement for purposes of [35 U.S.C.]  
24 § 271(a),” and therefore TPRA’s promotional demonstrations cannot amount to infringing “uses.”  
25 Dkt. No. 35 at 9-10 (quoting *Med. Sols., Inc. v. C Change Surgical LLC*, 541 F.3d 1136, 1140  
26 (Fed. Cir. 2008)). Garrett argues that TPRA’s reliance on *Medical Solutions* is misplaced because  
27 “[w]hile the mere display of an accused product is not a ‘use’ under § 271(a), putting the product  
28 into service through a demonstration is.” Dkt. No. 37 at 10. Garrett also points to subsequent

1 cases that have “confirm[ed] that a demonstration can, in fact, be an infringing use.” *Id.* at 12  
2 (citing *Marposs Societá Per Azioni v. Jenoptik Auto. N. Am.*, 262 F. Supp. 3d 611 (N.D. Ill. 2017);  
3 *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317 (Fed. Cir. 2009)).

4 The Court is not persuaded by either party’s position. TPRA is correct that some courts  
5 have routinely held that the “mere demonstration or display of an accused product, even in a[n]  
6 obviously commercial atmosphere, does not constitute an infringing use.” *See, e.g., Intermedics,*  
7 *Inc. v. Ventritex, Inc.*, 775 F. Supp. 1269, 1286 (N.D. Cal. 1991), *aff’d*, 991 F.2d 808 (Fed. Cir.  
8 1993); *see also L.A. Gear, Inc. v. E.S. Originals, Inc.*, 859 F. Supp. 1294, 1298 (C.D. Cal. 1994);  
9 *EBS Auto. Servs. v. Ill. Tool Works, Inc.*, No. 09-CV-996 JLS (MDD), 2011 U.S. Dist. LEXIS  
10 102163, at \*46 (S.D. Cal. Sep. 12, 2011); *Advanced Semiconductor Materials Am. v. Applied*  
11 *Materials, Inc.*, No. C-93-20853 RMW, 1995 U.S. Dist. LEXIS 22123, at \*16 (N.D. Cal. July 7,  
12 1995). However, those cases were decided before or did not grapple with the standard announced  
13 in *Centillion*, where the Federal Circuit defined “use” as “put[ting] the system into service, i.e., . . .  
14 exercis[ing] control over, and benefit[ting] from, the system’s application.” *See Centillion Data*  
15 *Sys., LLC v. Qwest Commc’ns Int’l, Inc.*, 631 F.3d 1279, 1282 (Fed. Cir. 2011) (quoting *NTP, Inc.*  
16 *v. Research In Motion, Ltd.*, 418 F.3d 1282, 1317 (Fed. Cir. 2005)) (emphasis added). It is  
17 conceivable that under certain circumstances a demonstration could result in a “benefit” to the  
18 alleged infringer similar to how the invention would “benefit” consumers when “used” for its  
19 intended purpose. Nevertheless, this Court is not convinced that the Federal Circuit has overruled  
20 prior decisions finding that a demonstration did not amount to an infringing use. In *Medical*  
21 *Solutions*, the court simply expressly did not reach the question of whether a demonstration could  
22 ever constitute an infringing “use.” 541 F.3d at 1141 (“In this case we need not (and do not)  
23 decide whether the demonstration of a product at a trade show could ever be sufficient to establish  
24 an infringing use”).

25 This Court need not resolve this issue today because the FAC pleads more than a “mere  
26 demonstration” to constitute an infringing “use,” such as through TPRA’s product development  
27 and testing of the accused products. The Federal Circuit “has established that testing is a use of  
28 the invention that may infringe under § 271(a).” *Waymark Corp. v. Porta Sys. Corp.*, 245 F.3d

1 1364, 1366 (Fed. Cir. 2001) (citing *Roche Prods. v. Bolar Pharm. Co.*, 733 F.2d 858, 863 (Fed.  
2 Cir. 1984)). “Nevertheless, the infringer must use the ‘patented invention.’” *Id.* It is hard to  
3 imagine a scenario where, prior to discovery, a plaintiff can sufficiently uncover evidence of  
4 internal business practices—like in-house testing—for purposes of supporting the allegations of a  
5 complaint. At some point, a plaintiff must rely on reasonable inferences drawn from the other  
6 available evidence at its disposal. Garrett asserts that the allegations regarding testing are “based  
7 on a reasonable inference made from available evidence.” Dkt. No. 37 at 16. And courts are  
8 required to “draw all reasonable inferences in favor of the plaintiff.” *See Usher*, 828 F.2d at 561.  
9 So, the question is whether Garrett’s inferences are reasonable.

10 As discussed above, even if it is implausible that TPRA infringes “each time” it conducts a  
11 test of the accused systems, *see* FAC ¶ 46, there is sufficient support for the allegation that some  
12 testing has resulted in an infringing “use” by TPRA. Specifically, Garrett alleges that “[t]he  
13 Kasa® surveillance system products cannot be used, tested, or demonstrated without a mobile  
14 device on which to install the Kasa® mobile application.” *Id.* ¶ 18. Garrett also describes how the  
15 accused products work, *see id.* ¶¶ 19-26, and maps specific uses of the products to the patent  
16 claims, *see id.* ¶¶ 42-45. Moreover, Garrett created two claims charts which map the evidence to  
17 specific claim limitations. *See generally* Dkt. Nos. 34-4, 34-5. This evidence of TPRA instructing  
18 customers on how to use the accused products in an infringing manner, as well as evidence of  
19 TPRA actually using the products in a manner that plausibly meets each of the claim limitations,  
20 constitutes sufficient circumstantial evidence at the pleading stage to support Garrett’s claim that  
21 TPRA used the accused products in an infringing manner during product development and testing.  
22 *See EBS Auto. Servs.*, 2011 U.S. Dist. LEXIS 102163, at \*47-48 (“Plaintiffs contend that ITW’s  
23 internal documents, training materials, and advertisements illustrate that ITW trains users on and  
24 tests the BrakeTech. This circumstantial evidence of use is sufficient to justify a jury verdict in  
25 Plaintiffs’ favor.”); *Nat’l Instruments Corp. v. The MathWorks, Inc.*, 113 F. App’x 895, 898 (Fed.  
26 Cir. 2004) (per curiam) (“The evidence of MathWorks’ training materials, which teach how to use  
27 Simulink to perform the infringing methods, and the evidence presented that Simulink was  
28 designed to infringe during its normal use presents substantial evidence for the jury to find either

1 direct or induced infringement.”).

2 The Court finds that Garrett has sufficiently pled a plausible claim that TPRA “uses” the  
3 accused products in an infringing manner.

4

5 **D. Garrett’s “Make” Claims are Plausible.**

6 In the first motion to dismiss, this Court held that Garrett had not sufficiently pled a claim  
7 of direct infringement for a “make” claim. Dkt. No. 32 at 5. In reaching that decision, the Court  
8 found that “Garrett ha[d] not alleged that TPRA manufactures . . . mobile devices as part of the  
9 accused products.” *Id.* And, while TPRA could have combined a third-party mobile device with  
10 the accused products to constitute a “make” claim, this Court also found that the original  
11 complaint merely alleged that the accused products *could be* combined in an infringing manner but  
12 not that TPRA actually combined the system in an infringing manner. *Id.* at 6 (“Garrett alleges in  
13 the Complaint that the infringing products *can be* used in an infringing manner but does not allege  
14 that TPRA has ever . . . assembled the system with a ‘mobile device’ in an infringing manner.”).

15 “In order to ‘make’ the system under § 271(a), [the direct infringer] would need to  
16 combine all of the claim elements.” *Centillion*, 631 F.3d at 1288. A direct infringer does not need  
17 to manufacture each individual component; instead, that infringer need only assemble the  
18 infringing components together such that the combination is infringing. *See Lifetime Indus., Inc.*  
19 *v. Trim-Lok, Inc.*, 869 F.3d 1372, 1378 (Fed. Cir. 2017) (“Although Lifetime did not allege that  
20 Trim-Lok made the RV onto which it installed the seal, Lifetime did allege that Trim-Lok installed the seal onto the RV; that is, Lifetime alleged that Trim-Lok made an infringing seal-RV  
21 combination.”).<sup>3</sup>

22 Here, Garrett alleges that a mobile device is required for the accused products to operate.  
23 FAC ¶ 18. Further, as described in section I.C above, Garrett describes how the accused products  
24 are made to infringe, *see id.* ¶¶ 19-26, and maps specific uses of the products to the patent claims,  
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27 <sup>3</sup> To the extent that the Court’s prior order implied that Garrett must allege that TPRA  
28 manufactures the mobile device in order to state a “make” claim, the Court agrees with Garrett  
that this was in error.

1 *see id.* ¶¶ 42-45. Because the system must be assembled before it can be used, there are sufficient  
2 allegations in the FAC that TPRA “makes” the accused products in an infringing manner.

3 Accordingly, the Court **DENIES** TPRA’s motion to dismiss Garrett’s claims of direct  
4 infringement because there are plausible allegations that TPRA “makes” and “uses” the accused  
5 products in an infringing manner.

6

## 7 **II. Direct Infringement by End Users**

8 Because the Court previously ruled on the other indirect infringement elements and TPRA  
9 does not raise challenges to those previously decided issues, the only remaining issue in dispute is  
10 whether there are sufficient allegations of direct infringement of the ’207 patent and the ’809  
11 patent by end users. TPRA argues that the FAC should be dismissed because the allegations of  
12 infringement by the end users are essentially the same as those against TPRA, the pleading  
13 language is merely a recitation of the claim language, and the only factual allegations are plainly  
14 incorrect based on the FAC, itself. Dkt. No. 35 at 13-14. TPRA also argues that “Garrett does not  
15 allege how an end user could perform each step that is required to be performed by a mobile  
16 device processor (as opposed to a mobile device operated by a user)” and “Garrett does not allege  
17 how a user could perform each step of a method that requires performing a step on a request by the  
18 same end user.” *Id.* at 14-15. Garrett counters that the allegations against the end users are amply  
19 supported in the FAC, Dkt. No. 37 at 17-18, and, “like in *Centillion*, all of the asserted method  
20 steps are performed by devices under the end user’s control and for the user’s benefit, and would  
21 not occur but for the user’s actions in assembling the system,” *id.* at 19-20 (citing *Centillion*, 631  
22 F.3d at 1285). The Court agrees with Garrett.

23 First, Garrett is correct that *Centillion* is controlling. There, the Federal Circuit found that  
24 functions performed by geographically remote, back-end servers were still attributable to the end  
25 user because “it is the customer initiated demand for the service which causes the back-end system  
26 to generate the requisite reports. This is ‘use’ because, but for the customer’s actions, the entire  
27 system would never have been put into service.” *See Centillion*, 631 F.3d at 1285.

28 Similarly, here, the user that sets up the surveillance system with the mobile device would

1 “control” the system and “put it into service.” As Garrett alleges, the accused products cannot  
2 function without a mobile device on which the mobile application is installed. FAC ¶ 18.  
3 Therefore, at this stage of the case, it is reasonable to infer that any actions that occur through  
4 components of the mobile device or the surveillance system hardware are “put into service” by the  
5 user during the setup and operation of the system.

6 Second, as described above, there is evidence of TPRA instructing its users on how to  
7 assemble and use the accused products in a manner which would infringe the ’207 patent. Dkt.  
8 No. 34-3 at 14-18. There are also allegations of TPRA promoting specific uses of the accused  
9 products that, at this stage, plausibly could be infringing. FAC ¶¶ 42-45. As such, Garrett has  
10 sufficiently pled the claims of indirect infringement for the ’207 patent. *See also Nat'l  
11 Instruments*, 113 F. App'x 895, 898 (“The evidence of MathWorks' training materials, which  
12 teach how to use Simulink to perform the infringing methods, and the evidence presented that  
13 Simulink was designed to infringe during its normal use presents substantial evidence for the jury  
14 to find either direct or induced infringement.”).

15 As to the ’809 patent, the only additional claim limitation requires a “datebook comprising  
16 days of the week and times of day that *can be* synchronized with an application of the user device  
17 to schedule the transferring of surveillance data.” Dkt No. 34-2 at 13 (emphasis added). The FAC  
18 alleges that end users use the mobile application of the accused products “to schedule the transfer  
19 of the surveillance data using a datebook that includes days of the week and times of day.” FAC  
20 ¶ 26. The instruction manuals and user guides instruct end users how to use the “datebook” to  
21 schedule when the camera will automatically turn On/Off. *See* Dkt. No. 34-3 at 17.

22 TPRA argues that turning the camera On/Off is not the same as “scheduling the transfer of  
23 surveillance data.” Dkt. No. 38 at 17. But TPRA acknowledges that “a camera cannot capture  
24 video unless it is on,” and whether “a camera is surveilling may affect what motion is detected.”  
25 *Id.* Therefore, it is possible that turning the camera On/Off could schedule the transfer of  
26 surveillance data because surveillance data cannot be received (and thereby transferred) when it is  
27 off. At this stage of the case and drawing all reasonable inferences in favor of Garrett, a  
28 reasonable reading of the “datebook” in the accused products is that this “datebook” schedules the

1 transferring of surveillance data insofar as no surveillance data can be transferred while the camera  
2 is off, but surveillance data can be transferred while the camera is on.

3 Accordingly, the Court finds that Garrett has plausibly alleged that TPRA indirectly  
4 infringed. Therefore, the Court **DENIES** TPRA's motion to dismiss Garrett's claims for indirect  
5 infringement.

### 6

### 7 III. Other Arguments

8 Finally, TPRA moves to dismiss all claims of patent infringement for failure to allege  
9 sufficient facts showing that certain claim limitations are met by the accused products. Dkt. No.  
10 35 at 15. First, TPRA moves to dismiss all independent claims (except claim 19 of the '207  
11 patent) “[b]ecause the transferring of video to the mobile device is caused *by the user* selecting the  
12 video in the application,” and, therefore, “it is not caused by the motion detection mechanism as  
13 required by the asserted claims.” *Id.* at 16 (emphasis in original). Specifically, TPRA points to  
14 the claim language that requires the transfer of surveillance data “when” motion is detected past a  
15 certain threshold. *Id.* Second, TPRA argues that for each claim of the '809 patent, “Garrett reads  
16 out the limitation ‘synchronized with an application of the user device,’ which then permits him to  
17 argue that the datebook from the Kasa application (not a datebook from the mobile device) meets  
18 the recited ‘datebook’ limitation.” *Id.* at 17. Third, TPRA argues that “Garrett’s allegation that  
19 the notification from the Kasa application ‘activates’ the mobile device is not plausible because  
20 the notification is coming from the server and not the mobile device processor. Indeed, because a  
21 user may be using his/her mobile device when receiving the notification, it will not always  
22 ‘activate’ upon receipt of the notification because it may already be ‘active.’” *Id.*

23 Each of TPRA’s arguments is essentially a claim construction argument couched in terms  
24 of a non-infringement argument. As such, the Court finds that these issues are more appropriate  
25 for resolution at the claim construction stage and will not dismiss the FAC on these grounds.

### 26

### 27 CONCLUSION

28 For the foregoing reasons and for good cause shown, the Court hereby **DENIES** TPRA’s

1 motion to dismiss Garrett's First Amended Complaint.  
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**IT IS SO ORDERED.**

4 Dated: November 23, 2020  
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SUSAN ILLSTON  
United States District Judge